

# Appendix to Petition for Certiorari.

## Cook County Appropriation Bill for Year 1943.

Page	Item	Amount
34	1-134 Outside Special Attorneys—for the purpose of employing special counsel and investigators to handle such legal matters as may be assigned by the President or Members of the Board of Commissioners of Cook County .....	\$ 7,500
53	8-12E Special work on 1943 personal property Assessment including analysis Federal Income Tax Returns (and other items) .....	\$13,410
60	10-134 Outside Special Attorneys .....	\$10,000
63	11-1 One Attorney .....	\$ 4,999
77	19-1 One Sheriff's Attorney .....	\$ 6,499
110	29-1 One Attorney .....	\$ 3,600
133	40-134 Outside Special Attorneys .....	\$50,000

(The foregoing kinds of items appear throughout all budget ordinances for all years. Said items are entirely distinct from and outside the provision made for the State's Attorney's Staff at page 85. That staff includes eighty-odd persons as attorneys. Budget Ordinances are Legislation of which all courts take judicial notice by statute.)

Constitution of Illinois Article 5, Section 24:

‘Office and employment defined.

“An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished.”

Illinois Revised Statutes Chapter 13:

“A license, as provided for herein, shall constitute the person receiving the same, an attorney and counsellor at law, and shall authorize him to appear in all of the courts within this State and there to practice as an attorney and counsellor at law, according to the laws and customs thereof, for and during his good behavior in said practice and to demand and receive fees for any services which he may render as an attorney and counsellor at law in this State.” (Section 1.)

Illinois Revised Statutes, Chap. 120, as amended June 28, 1917 (see page 26 above):

“*Suit by county for tax on forfeited property. Sec. 230. The county board may, at any time, institute suit in an action of debt in the name of the People of the State of Illinois in any court of competent jurisdiction for the whole amount due for taxes and special assessments on forfeited property; or any county, city, town, school district or other municipal corporation to which any such tax or special assessment may be due, may, at any time, institute suit in an action of debt in its own name, before any court of competent jurisdiction, for the amount of such tax or special assessment due any such corporation on forfeited property, and prosecute the same to final judgment. The county board may also, at any time, institute suit in an action of debt in the name of the People of the State of Illinois, in any court*

of competent jurisdiction, against any person, firm or corporation, for the recovery of any personal property tax due from such person, firm or corporation, and in tax due from such person, firm or corporation, for the recovery of any personal property tax due from such person, firm or corporation, and in any such suit for the recovery of personal property tax, the return of the county collector that such taxes are delinquent shall be prima facie evidence that such taxes are due and unpaid but the fact that such taxes are due and unpaid may be proven by other competent testimony. This act shall apply to all taxes heretofore levied against any person, firm or corporation and now upon any assessment book or roll, and on the sale of any property following such judgment on execution or otherwise, any *such county, city, town or school district or other municipal corporation, interested in the collection of said tax, may become purchaser at such sale of either real or personal property, and if the property so sold is not redeemed (in case of real estate) may acquire, hold, sell and dispose of the title thereto, the same as individuals may do under the laws of this state, and in any such suit or trial for forfeited taxes, the fact that real estate or personal property is assessed to a person, firm or corporation shall be prima facie evidence that such person, firm or corporation was the owner thereof, and liable for the taxes for the year or years for which the assessment was made, and such fact may be proved by the introduction in evidence of the proper assessment book or roll, or other competent proof."*

By Amendment in 1939, May 17, the only change made was to erase the words "action of debt" and substitute the words "in a civil action," and one other similar clause.

(19)

U. S. COURT, U. S.  
FILED  
APR 7 1944  
CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1943.

No. 786

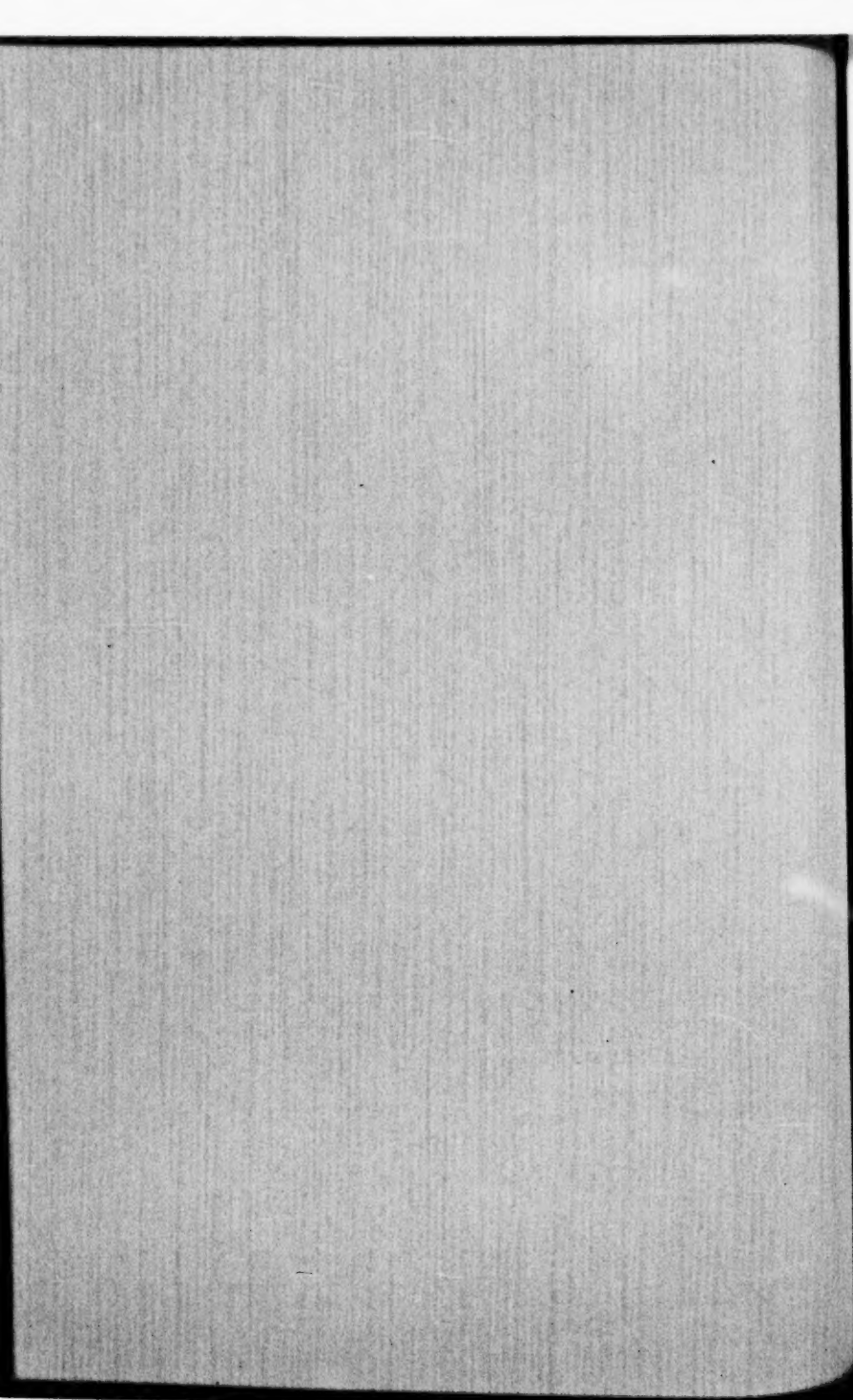
EDWARD M. WINSTON,  
*Petitioner,*  
VS.

THOMAS J. COURTNEY, State's Attorney, COUNTY  
OF COOK, a Municipal Corporation of the State of  
Illinois, and others,  
*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF ILLINOIS.  
THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF  
COOK COUNTY.

**ANSWER TO THE PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME COURT  
OF ILLINOIS, AND BRIEF IN SUPPORT  
THEREOF.**

THOMAS J. COURTNEY,  
State's Attorney of Cook County,  
FRANCIS S. CLAMITZ,  
WILLIAM J. TUOHY,  
JOSEPH P. BURKE,  
Assistant State's Attorneys,  
*Attorneys for Respondents.*



## TABLE OF CONTENTS.

---

	PAGE
Answer to Petition .....	1
Brief in Support .....	3
Statement of the Case .....	3
Opinion of the Illinois Supreme Court.....	Appendix
Points	
I. No questions under the Federal Constitution were raised in the trial or Appellate Court below .....	9
II. The questions of law decided by the Supreme Court of Illinois construed only Illinois stat- utes and questions under the Constitution of Illinois .....	10
III. Constitutional provision declaring that no state shall pass any law impairing the obligation of contracts applies only to legislative and not to Judicial actions .....	13
A. The judicial determination that no contract in fact exists is not an impairment of the obliga- tion of contract under the Federal Constitu- tion, and is finally determinable by the Su- preme Court of Illinois .....	14
Conclusion .....	15
Table of cases and authorities discussed .....	ii

## TABLE OF CASES AND AUTHORITIES DISCUSSED.

Appleby v. Butler, 221 U. S. 524.....	10
Bacon v. Texas, 163 U. S. 207.....	14
Brown v. Smart, 145 U. S. 454.....	14
Central Land Co. v. Laidley, 159 U. S. 103.....	14
Cleveland and Pittsburgh Railroad Co. v. City of Cleveland, Ohio, 235 U. S. 50.....	9
Columbia Ry. Co. v. South Carolina, 261 U. S. 236...	14
Commercial Bank v. Buckingham's Executors, 5 How. 317, 343 .....	13
Cross Lake Shooting and Fishing Club v. Louisiana, 224 U. S. 632 .....	14
Fergus v. Russel, 270 Ill. 304.....	11-12
Hanford v. Davis, 163 U. S. 273.....	14
Hope v. City of Alton, 214 Ill. 102.....	12
Hubert v. New Orleans, 218 U. S. 438.....	14
Knox v. Exchange Bank, 12 Wall. 379, 383.....	14
Kryger v. Wilson, 242 U. S. 171.....	14
LeHigh Water Company v. Easton, 121 U. S. 338.....	14
Mallors v. Commercial Loan and Trust Co., 216 U. S. 213 .....	10
Moore Mansfield Construction Co. v. Electric Installa- tion Co., 234 U. S. 619.....	10
National Bank v. Kentucky, 9 Wall. 353.....	10
National Mutual Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635 .....	14
New Orleans Water Works Co. v. Louisiana Sugar Refining Company, 125 U. S. 18, 30.....	14

Oxley Stove Co. v. Butler County, 166 U. S. 648.....	10
People v. Ashton, 358 Ill. 146.....	10, 11, 12
People ex rel. Thomas J. Courtney v. Henry M. Ashton, et al., 384 Ill. 283.....	Appendix
Railroad Company v. McClure, 10 Wall. 511.....	14
Ross v. Oregon, 227 U. S. 150.....	10, 14
Railroad Company v. Rock, 4 Wall. 177.....	13
Re Spies, 123 U. S. 131.....	10
Stevens v. Henry County, 218 Ill. 468.....	12
Tidal Oil Co. v. Flanagan, 263 U. S. 444.....	13
Toole County Irrigation Distriet v. Moody, et al., 125 F. 2nd 498, 316 U. S. 690.....	14
Turner v. Wilkes County Commissioners, 173 U. S. 635	14
Waters Pierce Oil Co. v. Texas, 212 U. S. 112.....	10
Zadig v. Baldwin, 166 U. S. 485.....	10

#### STATUTES AND CONSTITUTION.

Section 5, Chap. 14, Smith's Statutes 1933.....	11
Section 6 of Chap. 14, Ill. Rev. Statutes 1941.....	9
Section 22 of Art. 6, Constitution of 1870.....	11
Section 32 of Art 6, Constitution of 1870.....	11
Section 33, Chap. 34, Smith's Statutes 1933.....	11
Section 10, Article I, Constitution of the U. S.....	13, 15





IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1943.

---

No. 786

---

EDWARD M. WINSTON,

*Petitioner,*

vs.

THOMAS J. COURTNEY, State's Attorney, COUNTY  
OF COOK, a Municipal Corporation of the State of  
Illinois, and others,

*Respondents.*

---

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF ILLINOIS.

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF  
COOK COUNTY.

---

**ANSWER TO THE PETITION FOR WRIT OF CER-  
TIORARI TO THE SUPREME COURT OF ILLINOIS,  
AND BRIEF IN SUPPORT THEREOF.**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The respondents, THOMAS J. COURTNEY, State's Attorney  
of Cook County, Illinois, and COUNTY OF COOK, a Municipal  
Corporation, for answer unto the prayer of the Petitioner  
that this Court grant a writ of certiorari to review the  
final order of the Supreme Court of Illinois, says that  
there are no special or important reasons in this cause for  
a review or writ of certiorari; that no question under the  
United States Constitution was raised or decided in the

trial or Appellate Courts below; that the decision of the Supreme Court of Illinois did not deprive the petitioner of any vested right without due process of law, equal protection of the laws of the State of Illinois or impair the obligation of the petitioner's purported contract with the County of Cook, State of Illinois; nor has it decided a federal question in conflict with applicable decisions of the court or departed from the usual and accepted course of judicial procedure or sanctioned such a departure by the lower court.

Wherefore, these respondents ask that the writ of certiorari be denied, and offers the annexed brief and appendix thereto in support hereof.

Respectfully submitted,

COUNTY OF COOK,

*a Municipal Corporation,*

By THOMAS J. COURTNEY,

*State's Attorney of Cook County,  
Illinois,*

By FRANCIS S. CLAMITZ.

THOMAS J. COURTNEY,

*State's Attorney of Cook County,  
Illinois,*

By FRANCIS S. CLAMITZ.

Counsel for Respondents:

THOMAS J. COURTNEY,

*State's Attorney of Cook County,  
Illinois,*

FRANCIS S. CLAMITZ,

WILLIAM J. TUOHY,

JOSEPH P. BURKE,

*Assistant State's Attorneys,  
507 County Bldg., Chicago, Ill.*

## **BRIEF IN SUPPORT OF ANSWER.**

---

### **STATEMENT OF THE CASE.**

The statement of the case presented by the petitioner is replete with argument based upon assumed facts and contains many references to matter nowhere contained in the transcript filed in this court and contains statements of matter purporting to be contained in the record of this case which are unsupported by any reference to the transcript page, whereby the same may be verified. The respondents have therefore stated the facts of the case in a manner which we believe will inform the court of the matters in issue. We have not answered the various personal or political statements contained in the petitioner's statement of the case as they are neither germane to the proceeding nor properly included therein.

On May 22, 1931, the board of commissioners of Cook County adopted a resolution purporting to employ Henry M. Ashton as an attorney, which resolution, with appellants' written acceptances and certain supplementary resolutions, constitutes the contracts involved in these cases. In the preamble to the resolution it was recited that there was more than \$16,500,000 due in taxes on real estate in Cook County that had been forfeited to the State for non-payment; that by statute it was the nominal duty of the State's Attorney of the county to prosecute actions for the collection of delinquent taxes, if and when the county board provided by budget for the same, but that in recent months the number of forfeitures had increased to such an extent that the appropriation for the current year to the State's Attorney was inadequate to enable him to perform

the work involved in bringing such a large number of cases. It was stated that a large number of persons who had permitted their real estate to be forfeited for non-payment of taxes were financially responsible; that a large amount was due as penalties, that in some instances the accumulated penalties exceeded the amount of taxes due, and that all penalties when collected were the property of the county. It was stated that the regular duties of the legal adviser of the county board were such that he did not have time to enforce the collection of forfeited real estate taxes, that during the last five years the State's Attorney had collected in forfeited taxes and penalties about \$200,000 per year. In consideration of such premises, it was resolved:

“That Henry M. Ashton, attorney at law be and he is hereby retained and employed to begin and prosecute foreclosure suits and such other suits or proceedings as may be deemed desirable in order to collect the revenue now due to the State of Illinois and other taxing bodies from real estate in Cook County that is now forfeited to the state:

“That said Henry M. Ashton is hereby authorized and empowered to appear for and in behalf of and to represent the People of the State of Illinois and the County of Cook in all such suits as their attorney and solicitor; \* \* \*

“As the amount provided for in the 1931 budget to take care of this work of securing additional revenue from forfeited property in Cook County is not sufficient to insure a continuation of said work, the contract between this Board and the said attorney shall be considered a contingent one from the beginning of said attorney's employment. The sums to be paid by Cook County, as above set forth and as appropriated, shall be considered as an advance to said attorney for fees and expenses in order that said work may be properly started;

“However, all sums paid to said attorney, as well as all sums paid to his assistant, for clerk hire, steno-

graphic, and other expenses, shall be first deducted before any further money shall be paid to said attorney; \* \* \*."

Provision was made in the contract to pay Ashton \$600 per month and an additional amount of \$700 per month budgeted as follows: an assistant not to exceed \$300, a clerk \$250 and a stenographer \$150. It also provided that Ashton should be paid a contingent fee, the same to be computed upon the taxes and penalties collected, but that such fee should not be paid except from the penalties so collected. Various contingencies were set forth upon which the contingent fee was payable, the lowest percentage being fifteen per cent (15%) of the tax and penalty where there was one penalty, and scaling upwards of twenty per cent (20%) where there were two penalties, and twenty-five per cent (25%) where there were more than two, with the further provision that if in any six months' period voluntary settlement was made with the county treasurer through the State's Attorney's office, where the sum received exceeded \$150,000, then Ashton was to receive as further fee a sum equal to five per cent (5%) of such excess, with the provision that in computing the amount due under the five per cent (5%) clause the sums collected either by the State's Attorney or Ashton by suit or foreclosure should not be included. Claims for the regular monthly charges were to be paid on Ashton's verified statement and settlements were to be made as specified. It provided that the board of commissioners reserved the right to determine the basis of settlement with the property owner and the amount of penalty to be paid in cases where there was an adjustment for less than the total allowed by statute. It was stated that the contract should be effective as of May 15, 1931, and should terminate on November

30, 1932, unless renewed by the county board and said attorneys.

On May 25, 1931, Henry M. Ashton addressed a communication to the board, which referred to the resolution of May 22nd and stated that he accepted the employment on the terms outlined and would proceed with the work at once. The then State's Attorney approved the resolution as to form.

On April 16, 1932, Ashton addressed another communication to the board suggesting that Edward M. Winston, who is one of the appellants herein, be authorized to carry out Ashton's contract from that date until December 1, 1932. The request was approved April 27, 1932, and Edward M. Winston was given full power and authority to represent the board

"in all suits heretofore brought under said contract and to carry such suits to completion; and authority is also given hereby to the said Edward M. Winston to begin and prosecute with full power as attorney for this Board all other suits and proceedings which he may deem necessary and desirable to collect delinquent taxes due and unpaid on real estate in Cook County under the terms and conditions as to compensation which were provided in the contract with Henry M. Ashton."

On November 22, 1932, the board adopted a further resolution which recited

"That the authority heretofore granted by resolution of this Board to Edward M. Winston to represent said Board is hereby extended to March 15, 1933, with full power to begin any suits for collecting of delinquent taxes which he may deem desirable during the said period and to prosecute them to completion, and that the terms and conditions set forth in the original contract with Henry M. Ashton, dated May 15, 1931, and the resolution of authority to

Edward M. Winston dated April 27, 1932, shall be in force except as herein modified."

At the November election, 1932, Thomas J. Courtney, the present State's Attorney was elected to succeed the former State's Attorney and on July 22, 1933, he filed an information in equity in the Circuit Court of said county in which he made Ashton, Winston and several members of the board of commissioners parties defendant. It was alleged that Ashton and Winston had received \$20,000 pursuant to said contract, that another item of \$7263.92 had been audited, county warrants issued and would be delivered unless enjoined by decree of court. It was charged that the several resolutions adopted by the board were *ultra vires*, that the contract was illegal and void. The prayer was that Ashton and Winston be required to account for the \$20,000 previously received, that payment of the \$7263.92 be enjoined and that plaintiffs be granted general relief.

The county commissioners, Ashton and Winston filed separate pleadings. An issue was raised on a motion to dismiss as to whether it was within the powers and duties of the State's Attorney to bring an action on behalf of the People against the county commissioners of the county while he was the legal adviser of such board. The motion was sustained and the cause dismissed. On direct appeal (*People v. Ashton*, 358 Ill. 146) the decree was reversed and the cause remanded with directions.

After the cause was redocketed and the mandate filed Ashton and Winston each filed an answer. *Winston also filed a counterclaim to recover the fees due on the contract.* He claimed the amount due was in excess of one and one-half million dollars. The State's Attorney's motion to strike Winston's answer and counterclaim was sustained



and Winston elected to stand by his pleading whereupon a final judgment was entered against him. He brings the cause here for review.

Cause No. 27163 is an action at law instituted by Ashton and joined in by Butz against the County of Cook to receive the fees alleged to be due on the same resolutions and acceptances set forth in No. 27169. Winston was made a defendant. This suit was filed June 26, 1939. Butz filed a separate complaint in which it was alleged that during the regime of both Ashton and Winston he carried the burden of drawing the pleadings in all cases filed to enforce the collection of delinquent taxes; that he filed petitions to intervene in certain cases pending in the Federal courts and prosecuted claims in Probate Court against estates of deceased persons, and that Ashton, Winston, the County of Cook and the then State's Attorney had knowledge that he was performing such services. He claimed \$1,714,682.92 was due him for fees. A second count was on *quantum meruit*. *Winston filed an answer and counterclaim adopting Ashton's and Butz's pleadings.*

The State's Attorney's motion to strike Ashton's and Butz's complaint and Winston's answer and counterclaim was sustained and a final judgment entered. Ashton and Butz perfected a joint appeal to the Supreme Court of Illinois and Winston perfected a separate appeal. They will be referred to as appellants, and the People as represented by the State's Attorney as appellee.

People's motion to dismiss contained nine assignments but the ones urged (here) as grounds for reversal pertain solely to the power of the board of commissioners to make the contracts in question. Appellants have also pleaded estoppel against the county. (It is not claimed that appellants were employed to render service in actions then

pending, therefore, the provisions of section 6 of the State's Attorneys Act (Ill. Rev. Stat. 1941, chap. 14, par. 6) have no application.)

The law authorized court action to enforce the collection of delinquent real estate taxes. That appellants filed such suits in the name of the People and as a result of their efforts there was collected and paid into the county treasury it was alleged more than \$16,000,000 for the purpose of raising questions of law only, this is admitted. The principal question is as to the power of the board to employ private counsel to conduct such litigation.

# I.

## **NO QUESTIONS UNDER THE FEDERAL CONSTITUTION WERE RAISED IN THE TRIAL OR APPELLATE COURT BELOW.**

The rule is well established in the courts of last resort of the various states and in this Court that the Federal right alleged to have been infringed must have been adjudicated against the claimant in the State court.

While the pleadings of the Petitioner disclosed that he has raised questions of construction of the Statutes and Constitution of the State of Illinois in his pleadings in the trial court and in his brief and Petition for rehearing in the Supreme Court of Illinois, nowhere does it appear either in the pleadings or his briefs or Petition for rehearing that he has raised any question under the Constitution of the United States.

This Court in the case of *Cleveland and Pittsburgh Railroad Company v. City of Cleveland, Ohio*, 235 U. S. 50, said:

“In order to bring a case to the Supreme Court it is well settled that the Federal right must have been set

up and adjudicated against the claimant by the judgment of the State court. It is equally well settled that the contention made and passed upon in the State Court cannot be enlarged by assignments of error made to bring the case to this Court. *Nat. Bank v. Kentucky*, 9 Wall. 353; *Re Spies*, 123 U. S. 131; *Zadig v. Baldwin*, 166 U. S. 485; *Oxley Stove Co. v. Butler County*, 166 U. S. 648; *Waters Pierce Oil Co. v. Texas*, 212 U. S. 112; *Mallors v. Commercial Loan & Trust Co.*, 216 U. S. 613; *Appleby v. Buffalo*, 221 U. S. 524.

"It is equally well settled that an impairment of the obligation of the contract, within the meaning of the Federal Constitution must be by subsequent legislation, and no mere change in Judicial decision will amount to such deprivation. *Ross v. Oregon*, 227 U. S. 150; *Moore Mansfield Construction Co. v. Electrical Installation Co.*, 234 U. S. 619."

No Federal question having been raised in the courts below, this Court is without jurisdiction to grant the return of certiorari prayed by the Petitioner.

## II.

### **THE ACT OF THE ILLINOIS SUPREME COURT IN ALLEGEDLY CHANGING ITS CONSTRUCTION AND INTERPRETATION OF THE ILLINOIS CONSTITUTION AND STATUTES DID NOT OPERATE TO IMPAIR THE OBLIGATION OF THE PETITIONER'S PURPORTED CONTRACT.**

This controversy was previously before the Supreme Court of the State of Illinois in the case of *People v. Ashton*, 358 Ill. 146, in which was involved the very contract here involved. In that Appeal the question involved was whether or not the State's Attorney was the proper party to bring in Information for the purpose of testing the power of the County Board to enter into the purported

contract with the Petitioner. While not finally determinative of the law in regard to the power of the Board of County Commissioners of Cook County to enter into the contract the Court decided that the County Board may not strip a constitutional officer of his powers nor transfer them to others. At pages 150-151, the Court said:

“Section 22 of article 6 of the constitution provides for the election of a State’s attorney. Section 32 of that article concerns the residence, performance of duties of the State’s attorney and other officers and the filling of vacancies in the office. Those duties are to be as prescribed by law. The question arising in this connection is whether the county board has power to deprive the State’s attorney of those duties or transfer them to private counsel. In *Fergus v. Russel*, 270 Ill. 304, the duties of a constitutional officer, such as State’s attorney, are definitely stated, and it is there held that a legislative body may not strip a constitutional officer of his powers nor transfer them to others. Section 5 of the act entitled, ‘An act in regard to Attorney General and State’s attorney. Among them is to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in this county in which the people of the State or county may be concerned. By section 33 of chapter 34 (Smith’s Stat. 1933, p. 847,) it is made the duty of the county board ‘to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the State assessment.’ ”

From the foregoing it may be seen that the decision of the Illinois Supreme Court in the instant case, sought to be reviewed herein, could not be different than it is unless the Supreme Court of Illinois were to overrule its decision in the case of *People v. Ashton*. The Illinois Supreme

Court, in *People v. Ashton*, 358 Ill. 146, 151, *supra*, in saying that

“In *Fergus v. Russel*, 270 Ill. 304, the duties of a constitutional officer, such as *State's Attorney*, are definitely stated, and is there held that a legislative body may not strip a constitutional officer of his powers nor transfer them to others.”

We have, therefore, in the State's attorney a constitutional officer whose powers may not be stripped or transferred by a legislative body. This brings us to the question of whether the Board of County Commissioners, being admittedly a legislative body, attempted to strip the State's attorney, a constitutional officer, of powers belonging to his office, or attempted to transfer powers belonging to his office to others.

In the instant case the Supreme Court of Illinois, speaking through Mr. Justice Murphy, said:

“The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (*Fergus v. Russel*, 270 Ill. 304; *Stevens v. Henry County*, 218 Ill. 468; *Hope v. City of Alton*, 214 Ill. 102.) The contract of employment under which appellants claim were *ultra vires* and void.”

(This case is reported Vol. 384 Ill., p. 283, which opinion is set in full as an Appendix to this Brief.)

It may thus be concluded that there was no change in construction of decision which deprived the Petitioner of any right without due process of law or denied him equal protection of the laws of the State of Illinois.

## III.

**CONSTITUTIONAL PROVISION DECLARING THAT  
NO STATE SHALL PASS ANY LAW IMPAIRING  
THE OBLIGATION OF CONTRACTS APPLIES ONLY  
TO THE LEGISLATURE AND NOT TO JUDICIAL  
ACTIONS.**

The record of this case nowhere reveals that the petitioner bases his claim to any federal right upon any action by the legislature. He does, however, contend that the Illinois Supreme Court did impair the obligation of his purported contract by finding that no contract in fact exists. He alleges that the Illinois Supreme Court by its construction of the Illinois Constitution and Statutes impaired his constitutional rights.

Claims of this type have been made before this Honorable Court in cases too numerous to cite completely. Counsel for respondents will cite but a few of them, well knowing that this Court is conversant with the principle involved.

In the leading case of *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, this court said

“It has been settled by a long line of decisions that the provision of Section 10, Article 1, of the Federal Constitution, protecting the obligation of contracts against state actions, is directed only against impairment by legislation and not by judgment of the courts. The language—‘No State shall—pass any—law impairing the obligation of contracts’—plainly requires such a conclusion. However, the fact that it has been necessary for this court to decide the question so many times is evidence of persistent error in regard to it.

“*Commercial Bank v. Buckingham's Executors*, 5 How. 317, 343; *Railroad Co. v. Rock*, 4 Wall 177;

*Railroad Co. v. McClure*, 10 Wall 511; *Knox v. Exchange Bank*, 12 Wall 379, 383; *LeHigh Water Co. v. Easton*, 121 U. S. 338; *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 30; *Brown v. Swart*, 145 U. S. 454; *Central Land Co. v. Laidley*, 159 U. S. 103; *Bacon v. Texas*, 163 U. S. 207; *Hanford v. Davis*, 163 U. S. 273; *Turner v. Wilkes County Commissioners*, 173 U. S. 635; *Hubert v. New Orleans*, 218 U. S. 438; *Cross Lake Shooting and Fishing Club v. Louisiana*, 224 U. S. 632; *Ross v. Oregon*, 227 U. S. 150; *Kryger v. Wilson*, 242 U. S. 171; *Rooker v. Fidelity and Trust Co.*, 261 U. S. 114; *Columbia Ry. Co. v. South Carolina*, 261 U. S. 236."

To the same effect see also *National Mutual B. & L. Ass'n v. Brahan*, 193 U. S. 635 and *Bacon v. Texas*, 163 U. S. 207.

#### A.

**The judicial determination that no contract in fact exists is not an impairment of the obligation of contract under the Federal Constitution, and is finally determinable by the Supreme Court of Illinois.**

The petitioner confuses the importance of the questions to him with their importance objectively. He asked this Court to take a case and render an opinion which would necessarily conflict with previous decisions of this Court in cases where the applicable law is well settled. In the case of *Toole County Irrigation District v. Moody, et al.*, 125 F. 2nd 498, certiorari denied, 316 U. S. 690 the facts involved were similar to the facts in the instant case. In that case, the petitioners beg the question as they do in the instant case by assuming that a contract existed. In that case, as in the instant case, the Court below held that no contract in fact existed because of the lack of power on the part of the municipality to enter into a contract of the

nature involved. In the *Toole County* case, the Court said:

“Appellees argue that to give effect to the Montana decisions would violate the Constitution by impairing the obligation of a contract, namely the district’s obligation the existence of which is here in dispute. Appellees argument assumes the existence of the obligation and thus begs the question, the question being whether or not the obligation exists. Whether it exists or not must be determined by the law of Montana as declared in *State ex rel. Malott v. Board of County Commissioners* and *Rosebud Land and Improvement Co. v. Carterville Irrigation District*. According to that law, the obligation which appellees say must not be impaired does not exist.”

The Supreme Court of Illinois merely decided that the Board of County Commissioners of Cook County had no power to enter into the contracts by virtue of any statute and that it was the duty of the State’s Attorney of Cook County to perform the services which were the subject matter of the purported contract. As to these matters, we submit that the opinion of the Supreme Court of Illinois is final.

### CONCLUSION.

We submit that the petitioner has not shown the actual existence of grounds for the issuance of a writ of certiorari, and respectfully request that his petition be denied.

Respectfully submitted,

THOMAS J. COURTNEY,

State’s Attorney of Cook County.

FRANCIS S. CLAMITZ,

WILLIAM J. TUOHY,

JOSEPH P. BURKE,

Assistant State’s Attorneys,

*Attorneys for Respondents.*





## APPENDIX TO ANSWER TO PETITION FOR WRIT OF CERTIORARI.

### OPINION OF THE ILLINOIS SUPREME COURT.

Docket Nos. 27163 and 27169, Cons.—Agenda 25—May, 1943.

The People *ex rel.* Thomas J. Courtney, Appellee, v. Henry M. Ashton *et al.*, Appellants.—Henry M. Ashton *et al.*, Appellants, v. The County of Cook *et al.*—(The County of Cook, Appellee.)

MR. JUSTICE MURPHY delivered the opinion of the court:

Pursuant to an order entered in vacation, causes No. 27163 and No. 27169 were consolidated for oral argument and opinion. The primary question in each case is as to the liability of the county of Cook to pay appellants Henry M. Ashton, Edward M. Winston and Ralph O. Butz, all of whom are lawyers, for legal services performed by them for the county pursuant to the terms of contracts of employment. The contracts provided that appellants were to institute legal proceedings and take such steps as were necessary to collect forfeited real estate taxes and penalties. On behalf of the People, represented by the State's Attorney of Cook county, it was contended that the board of commissioners of the county acted without authority of law, that their acts were *ultra vires* and the contracts void. It is claimed that the action of the board in employing private attorneys to perform such service was in effect taking a power and duty given by the constitution and statute to the State's Attorney and conferring it on another. These contentions involve interpretation of certain provisions of our State constitution and this gives the court jurisdiction to review the cases on direct appeal.

On May 22, 1931, the board of commissioners of Cook county adopted a resolution purporting to employ Henry M. Ashton as an attorney, which resolution, with appellants' written acceptances and certain supplementary reso-

lutions, constitutes the contracts involved in these cases. In the preamble to the resolution it was recited that there was more than \$16,500,000 due in taxes on real estate in Cook county that had been forfeited to the State for nonpayment; that by statute it was the nominal duty of the State's Attorney of the county to prosecute actions for the collection of delinquent taxes, if and when the county board provided by budget for the same, but that in recent months the number of forfeitures had increased to such an extent that the appropriation for the current year to the State's Attorney was inadequate to enable him to perform the work involved in bringing such a large number of cases. It was stated that a large number of persons who had permitted their real estate to be forfeited for nonpayment of taxes were financially responsible; that a large amount was due as penalties, that in some instances the accumulated penalties exceeded the amount of taxes due, and that all penalties when collected were the property of the county. It was stated that the regular duties of the legal adviser of the county board were such that he did not have time to enforce the collection of forfeited real estate taxes, that during the last five years the State's Attorney had collected in forfeited taxes and penalties about \$200,000 per year. In consideration of such premises, it was resolved: "That Henry M. Ashton, attorney at law be and he is hereby retained and employed to begin and prosecute foreclosure suits and such other suits or proceedings as may be deemed desirable in order to collect the revenue now due to the State of Illinois and other taxing bodies from real estate in Cook county that is now forfeited to the state:

"That said Henry M. Ashton is hereby authorized and empowered to appear for and in behalf of and to represent the People of the State of Illinois and the County of Cook in all such suits as their attorney and solicitor; \* \* \*

"As the amount provided for in the 1931 budget to take care of this work of securing additional revenue from forfeited property in Cook county is not sufficient to insure a continuation of said work, the contract between this Board and the said attorney shall be considered a contingent one from the beginning of said attorney's employment. The sums to be paid by Cook county, as above

set forth and as appropriated, shall be considered as an advance to said attorney for fees and expenses in order that said work may be properly started;

"However, all sums paid to said attorney, as well as all sums paid to his assistant, for clerk hire, stenographic, and other expenses, shall be first deducted before any further money shall be paid to said attorney; \* \* \*."

Provision was made in the contract to pay Ashton \$600 per month and an additional amount of \$700 per month budgeted as follows: an assistant not to exceed \$300, a clerk \$250 and a stenographer \$150. It also provided that Ashton should be paid a contingent fee, the same to be computed upon the taxes and penalties collected, but that such fee should not be paid except from the penalties so collected. Various contingencies were set forth upon which the contingent fee was payable, the lowest percentage being fifteen percent (15%) of the tax and penalty where there was one penalty, and scaling upwards of twenty percent (20%) where there were two penalties, and twenty-five percent (25%) where there were more than two, with the further provision that if in any six months' period voluntary settlement was made with the county treasurer through the State's Attorney's office, where the sum received exceeded \$150,000, then Ashton was to receive as further fee a sum equal to five percent (5%) of such excess, with the provision that in computing the amount due under the five percent (5%) clause the sums collected either by the State's Attorney or Ashton by suit or foreclosure should not be included. Claims for the regular monthly charges were to be paid on Ashton's verified statement and settlements were to be made as specified. It provided that the board of commissioners reserved the right to determine the basis of settlement with the property owner and the amount of penalty to be paid in cases where there was an adjustment for less than the total allowed by statute. It was stated that the contract should be effective as of May 15, 1931, and should terminate on November 30, 1932, unless renewed by the county board and said attorneys.

On May 25, 1931, Henry M. Ashton addressed a communication to the board, which referred to the resolution of May 22 and stated that he accepted the employ-

ment on the terms outlined and would proceed with the work at once. The then State's Attorney approved the resolution as to form.

On April 16, 1932, Ashton addressed another communication to the board suggesting that Edward M. Winston, who is one of the appellants herein, be authorized to carry out Ashton's contract from that date until December 1, 1932. The request was approved April 27, 1932, and Edward M. Winston was given full power and authority to represent the board "in all suits heretofore brought under said contract and to carry such suits to completion; and authority is also given hereby to the said Edward M. Winston to begin and prosecute with full power as attorney for this Board all other suits and proceedings which he may deem necessary and desirable to collect delinquent taxes due and unpaid on real estate in Cook county under the terms and conditions as to compensation which were provided in the contract with Henry M. Ashton."

On November 22, 1932, the board adopted a further resolution which recited "That the authority heretofore granted by resolution of this Board to Edward M. Winston to represent said Board is hereby extended to March 15th, 1933, with full power to begin any suits for collecting of delinquent taxes which he may deem desirable during the said period and to prosecute them to completion, and that the terms and conditions set forth in the original contract with Henry M. Ashton, dated May 15, 1931, and the resolution of authority to Edward M. Winston, dated April 27, 1932, shall be in force except as herein modified."

At the November election, 1932, another was elected to succeed the former State's Attorney and on July 22, 1933, he filed an information in equity in the circuit court of said county in which he made Ashton, Winston and the several members of the board of commissioners parties defendant. It was alleged that Ashton and Winston had received \$20,000 pursuant to said contract, that another item of \$7263.92 had been audited, county warrants issued and would be delivered unless enjoined by decree of court. It was charged that the several resolutions adopted by the board were *ultra vires*, that the contract was illegal and void. The prayer was that Ashton and Winston be required to account for the \$20,000 previously received.

that payment of the \$7263.92 be enjoined and that plaintiffs be granted general relief.

The county commissioners, Ashton and Winston filed separate pleadings. An issue was raised on a motion to dismiss as to whether it was within the powers and duties of the State's Attorney to bring an action on behalf of the People against the county commissioners of the county while he was the legal adviser of such board. The motion was sustained and the cause dismissed. On direct appeal (*People v. Ashton*, 358 Ill. 146) the decree was reversed and the cause remanded with directions.

After the cause was redocketed and the mandate filed, Ashton and Winston each filed an answer. Winston also filed a counterclaim to recover the fees due on the contract. He claimed the amount due was in excess of one and one-half million dollars. The State's Attorney's motion to strike Winston's answer and counterclaim was sustained and Winston elected to stand by his pleading whereupon a final judgment was entered against him. He brings the cause here for review.

Cause No. 27163 is an action at law instituted by Ashton and joined in by Butz against the county of Cook to recover the fees alleged to be due on the same resolutions and acceptances set forth in No. 27169. Winston was made a defendant. This suit was filed June 26, 1939. Butz filed a separate complaint in which it was alleged that during the regime of both Ashton and Winston he carried the burden of drawing the pleadings in all cases filed to enforce the collection of delinquent taxes; that he filed petitions to intervene in certain cases pending in the Federal courts and prosecuted claims in probate court against estates of deceased persons, and that Ashton, Winston, the county of Cook and the then State's Attorney had knowledge that he was performing such services. He claimed that \$1,714,682.92 was due him for fees. A second count was on *quantum meruit*. Winston filed an answer and counterclaim adopting Ashton's and Butz's pleadings.

The State's Attorney's motion to strike Ashton's and Butz's complaint and Winston's answer and counterclaim was sustained and a final judgment entered. Ashton and Butz perfected a joint appeal and Winston brings his cause

here by a separate appeal. They will be referred to as appellants, and the People as represented by the State's Attorney as appellee.

Appellee's motion to dismiss contained nine assignments but the ones urged here as grounds for reversal pertain solely to the power of the board of commissioners to make the contracts in question. Appellants have also pleaded estoppel against the county. It is not claimed that appellants were employed to render service in actions then pending, therefore, the provisions of section 6 of the State's Attorneys Act (Ill. Rev. Stat. 1941, chap. 14, par. 6) have no application.

The law authorizes court action to enforce the collection of delinquent real estate taxes. That appellants filed such suits in the name of the People and as a result of their efforts there was collected and paid into the county treasury more than \$16,000,000 is admitted by the motions to strike. The principal question is as to the power of the board to employ private counsel to conduct such litigation, but appellee's contention that the board was without such power, and that the law confers such power on and makes it the duty of the State's Attorney to render such legal service, necessitates an examination of the law as to the powers of the board and the State's Attorney in such matters.

Section 7 of article X of the constitution provides that the "county affairs of Cook county shall be managed by a board of commissioners of fifteen persons \* \* \* in such manner as may be provided by law." The fullest meaning that can be given to such language is that it creates the board of commissioners and vests in it the power to manage the county's affairs. The scope and breadth of the phrase "county affairs" is not defined, nor is there amplification as to what authority the board may exercise and be within the scope and meaning of the word "manage." It is therefore necessary to look to the legislative enactments for the power that has been delegated to the board in the management of county affairs and determine whether the power here exercised was conferred by statute. *Dahnke v. People*, 168 Ill. 102.

By section 22 of the Counties Act (Ill. Rev. Stat. 1941, chap. 34, par. 22,) a county may sue or be sued, and by

section 23 it is directed that "the powers of the county as a body corporate or politic, shall be exercised by a county board, to-wit: \* \* \* in the County of Cook, by a board of county commissioners, pursuant to section 7 of article X of the constitution." Other provisions pertaining to the powers of the board are found in subparagraph 3 of section 24, which directs that the board has power "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." Subparagraph 2, section 25, gives the board authority to manage the county funds and county business, and by subparagraph 5 of the same section it is given authority to levy and collect taxes for county purposes. By section 33 of the Counties Act it is made the duty of county boards "to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the state assessments."

Section 22 of article VI of the constitution creates the office of State's Attorney and provides for his election. Section 32 of the same article refers to the residence, the performance of the duties of the State's Attorney and other officers and the manner in which vacancies in any of such offices may be filled. It is provided that "all officers, [which includes State's Attorneys] where not otherwise provided for in this article, shall perform such duties and receive such compensation as is or may be provided by law." It will be observed that these constitutional provisions do not prescribe the specific duties of the State's Attorney. It has been held that the State's Attorney is an officer provided for by the constitution and that he is a county officer. (*Cook County v. Healy*, 222 Ill. 310.) Section 5 of the State's Attorneys Act (Ill. Rev. Stat. 1941, chap. 14, par. 5) directs it shall be the duty of the State's Attorney "to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the state or county may be concerned," and second, "to prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing